Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

OCTOBER TERM, 2004

MAJEED ALTAMIMI,
Petitioner,

V.

DANIEL J. BRABENDER, JR., W. RICHARD COWELL, JOHN R. WINGERTER, LEE C. FULLER, TED J. PADDEN, DONALD J. ROGALA, BRADLEY K. ENTERLINE, MARY PAYTON JARVIE, individuals, and CARNEY & GOOD, a professional partnership,
Respondents.

Petition For A Writ of Certiorari To The Supreme Court Of Pennsylvania

PETITION FOR WRIT OF CERTIORARI

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August 23, 2004

QUESTION PRESENTED

I. Whether the decision of the Pennsylvania Supreme Court in Bailey v. Tucker, 533 Pa. 237, 621 A.2d 108 (1993) violates the due process and equal protection clauses of the United States and Pennsylvania Constitutions and conflicts with other state courts of last result by requiring a party to file a legal malpractice action arising out of an attorney's representation of the plaintiff in a criminal matter within two years after the attorney client relationship terminates rather then within two years of the date the cause of action actually accrues in accordance with the requirements imposed by the court for such claims, thereby denying a victim of legal malpractice the due process of law that is accorded other plaintiffs.

LIST OF PARTIES

The parties to the proceedings below were the petitioner, Majeed Altamimi, and the Respondents, Daniel J. Brabender, Jr., W. Richard Cowell, John R. Wingerter, Lee C. Fuller, Ted J. Padden, Donald J. Rogala, Bradley K. Enterline, Mary Payton Jarvie, Individuals and partners, and Carney & Good, a professional partnership, who were the defendants and appellees below.

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I. The decision of the Pennsylvania Supreme Court in Bailey v. Tucker, 533 Pa. 237, 621 A.2d 108 (1993) violates the due process and equal protection clauses of the United States and Pennsylvania Constitutions and conflicts with other state courts of last resort by requiring a party to file a legal malpractice action arising out

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of an attorney's representation of the plaintiff in a criminal matter within two years after the attorney client relationship terminates rather then within two years of the date the cause of action actually accrues in accordance with the requirements imposed by the court for such claims, thereby denying a victim of legal malpractice the due process of law that is accorded other plaintiffs. 12

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MAJEED ALTAMIMI,
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V.

DANIEL J. BRABENDER, JR., W. RICHARD COWELL, JOHN R. WINGERTER, LEE C. FULLER, TED J. PADDEN, DONALD J. ROGALA, BRADLEY K. ENTERLINE, MARY PAYTON JARVIE, individuals, and CARNEY & GOOD, a professional partnership,
Respondents.

Petition For A Writ of Certiorari To The Supreme Court Of Pennsylvania

The petitioner, Majeed Altamimi, respectfully prays that a writ of certiorari issue to review the Judgment and Opinion of the Supreme Court of Pennsylvania entered on May 25, 2004, which refused to review and reverse the Judgment and Opinion of the Superior Court of Pennsylvania entered on December 23, 2003.

OPINIONS BELOW

The Order entered by the Supreme Court of Pennsylvania has not been reported as of this date. It is reprinted in the appendix hereto, at 1a.

The Opinion and Order of the Superior Court of Pennsylvania is reported at 839 A.2d 1133, and is reprinted in the appendix hereto, at 2a-8a.

The Opinion and Order of the Court of Common Pleas of Erie County has not been reported. It is reprinted in the appendix hereto, at 9a-13a.

JURISDICTION

The jurisdiction of this Honorable Court to review the Judgment of the Supreme Court of Pennsylvania which refused to review and reverse the Opinion and Judgment of the Superior Court of Pennsylvania is invoked under 28 U.S. C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Fourteenth Amendment:

Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution of the Commonwealth of Pennsylvania, Article I, Declaration of Rights:

§ 11. Courts to be open; suits against the Commonwealth

All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay. Suits may be brought against the Commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct.

§ 26. No discrimination by Commonwealth and its political subdivisions

Neither the Commonwealth nor any political subdivision

thereof shall deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right.

***42 Pa.C.S.A. § 5524.* Two year limitation**

The following actions and proceedings must be commenced within two years:

(1) An action for assault, battery, false imprisonment, false arrest, malicious prosecution or malicious abuse of process.

(2) An action to recover damages for injuries to the person or for the death of an individual caused by the wrongful act or neglect or unlawful violence or negligence of another.

(3) An action for taking, detaining or injuring personal property, including actions for specific recovery thereof.

(4) An action for waste or trespass of real property.

(5) An action upon a statute for a civil penalty or forfeiture.

(6) An action against any officer of any government unit for the nonpayment of money or the nondelivery of property collected upon on execution or otherwise in his possession.

(7) Any other action or proceeding to recover damages for injury to person or property which is founded on negligent, intentional, or otherwise tortious conduct or any other action or proceeding sounding in trespass, including deceit or fraud, except an action or proceeding subject to another limitation specified in this subchapter.

(8) An action to recover damages for injury to a person or for the death of a person caused by exposure to asbestos shall be commenced within two years from the date on which the person is informed by a licensed physician that the person has been injured by such exposure or upon the date on which the person knew or in the exercise of reasonable diligence should

have known that the person had an injury which was caused by such exposure, whichever date occurs first. Amended 1982, Dec. 20, P.L. 1409, No. 326, art. II, § 201, effective in 60 days; 2001, Dec. 17, P.L. 904, No. 101, § 2, effective in 60 days.

42 Pa.C.S.A. § 8355. Certification of pleadings, motions and other papers

Every pleading, motion and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name and his address shall be stated. A party who is not represented by an attorney shall sign his pleading, motion or other paper and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The signature of an attorney or party constitutes a certification by him that he has read the pleading, motion or other paper; that, to the best of his knowledge, information and belief, it is well-grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification or reversal of existing law; and that it is not interposed in bad faith or for any improper purpose, such as to harass another, to maliciously injure another or to cause unnecessary delay or increase in the cost of litigation. If a pleading, motion or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion or other paper is signed in violation of this section, the court shall award to the successful party costs and reasonable attorney fees and may, in addition, impose a civil penalty which shall not exceed $10,000. Such costs, fees and civil penalty shall be in addition to any other judgment awarded to the successful party and shall be imposed upon the person who signed the pleading, motion or other paper, or a represented party, or both. This

section is in addition to and shall not be construed to limit any other remedies or sanctions provided by law.

1990, Feb. 7, P.L. 11, No. 6, § 3, effective in 60 days.

Pennsylvania Rules of Civil Procedure:

RULE 1023.1 SCOPE. SIGNING OF DOCUMENT. REPRESENTATIONS TO THE COURT. VIOLATIONS.

(a) Rules 1023.1 through 1023.4 do not apply to disclosures and discovery requests, responses, objections and discovery motions that are subject to the provisions of general rules.

(b) Every pleading, written motion, and other paper directed to the court shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. This rule shall not be construed to suspend or modify the provisions of Rule 1024 or Rule 1029(e).

(c) The signature of an attorney or pro se party constitutes a certificate that the signatory has read the pleading, motion, or other paper. By signing, filing, submitting, or later advocating such a document, the attorney or pro se party certifies that, to the best of that person's knowledge, information and belief, formed after an inquiry reasonable under the circumstances,

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation,

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification or reversal of existing law or the establishment of new law,

(3) the factual allegations have evidentiary support or, if specifically so identified, are likely to have evidentiary

support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual allegations are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(d) If, after notice and a reasonable opportunity to respond, the court determines that subdivision (c) has been violated, the court may, subject to the conditions stated in Rules 1023.2 through 1023.4, impose an appropriate sanction upon any attorneys, law firms and parties that have violated subdivision (c) or are responsible for the violation.

Official Note: The court in its discretion at any stage of the proceedings may deny a motion for sanctions without hearing or argument. The grant or denial of relief (e.g., grant or denial of preliminary objections, motion for summary judgment or discovery application) does not, of itself, ordinarily warrant the imposition of sanctions against the party opposing or seeking the relief. In most circumstances, a motion for sanctions with respect to factual allegations should be addressing whether there is evidentiary support for claims or defenses rather than whether there is evidentiary support for each specific factual allegation in a pleading or motion. The inclusion in the rule of a provision for "an appropriate sanction" is designed to prevent the abuse of litigation. The rule is not a fee-shifting rule per se although the award of reasonable attorney's fees may be an appropriate sanction in a particular case. The provision requiring that a motion under this rule be filed before the entry of final judgment in the trial court is intended to carry out the objective of expeditious disposition and to eliminate piecemeal appeals. Where appropriate, such motions should be filed as soon as practicable after discovery of the violation. The following provisions of the Judicial Code, 42 Pa.C.S., provide additional relief from dilatory or frivolous proceedings: (1)

Section 2503 relating to the right of participants to receive counsel fees and (2) Section 8351 et seq. relating to wrongful use of civil proceedings.

(e) Section 8355 of the Judicial Code, 42 Pa.C.S.A. § 8355 is suspended absolutely, is suspended absolutely, in accordance with the provisions of the Constitution of 1968, Article V, Section 10(c).

Official Note: Section 8355 of the Judicial Code provides for the certification of pleadings, motions and other papers.

Source

The provisions of this Rule 1023.1 adopted April 22, 2002, effective July 1, 2002, 32 Pa.B. 2315; amended April 2, 2003, effective June 1, 2003, 33 Pa.B. 1926. Immediately preceding text appears at serial pages (288324) to (288325).

STATEMENT OF THE CASE

Petitioner, Majeed Altamimi, is a refugee from Iraq, who escaped his homeland in 1994 to seek freedom in the United States. While in Iraq, the petitioner was a political prisoner subjected to unspeakable torture which rendered him incontinent and impotent with the loss of sexual functioning. (3a). When he arrived in this country he could not speak, read or understand the English language. In February of 1995, petitioner was charged with Criminal Solicitation to Commit Indecent Assault, Indecent Assault, and Corruption of Minors in violation of the Pennsylvania Crimes Code. The charges

arose out of an alleged incident involving a ten year old minor. After being charged with the crimes, Mr. Altamimi hired the respondent, Daniel J. Brabender, Jr. and his law firm as his attorneys. (4a).

Brabender was told by petitioner through his counselor that he was innocent and did not commit any of the crimes charged. Respondents never asked the petitioner about his background or for any information or facts which would help them to prove his innocence. Instead, respondents sought a plea agreement with the District Attorney's Office in return for probation on the charges. The preliminary hearing was waived and the respondents obtained a plea agreement in which the charge of Criminal Solicitation was dropped and the petitioner would plead guilty to Indecent Assault and Corruption of Minors in return for the promise that the D.A. would not oppose probation on the charges.(4a).

The petitioner's attorneys never investigated the claims against Mr Altamimi to determine whether he was capable of performing the acts alleged against him. If he had asked the questions, Respondent Brabender would have learned that the petitioner was tortured in Iraq for refusing to cooperate with the despotic government. As a result of this torture, his penis was scarred and he suffered from an erectile

dysfunction. At times he was incontinent which required him to wear a diaper. Petitioner's physical limitations and disabilities would have made it impossible for him to perform the acts alleged against him in the criminal complaint. (3a).

In order to convince petitioner to accept the proposed plea agreement, Respondent Brabender told him that the crime of criminal solicitation was a felony and any conviction would result in felony jail time. The truth is that the charge of criminal solicitation was a misdemeanor and not a felony. At the plea hearing, when the Common Pleas Court refused to accept the Commonwealth's agreement not to oppose probation, Respondent Brabender, without any consultation with the petitioner, advised the Court that his client would agree to accept the plea agreement with this significant change. He failed to advise his client of the consequences of the Judge's decision that the District Attorney's office could now recommend imprisonment. Petitioner believed that he would still receive probation. Instead, the District Attorney at the Sentencing Hearing recommended to the Court and Mr. Altamimi was sentenced to five years imprisonment on the charges. (5a).

Petitioner appealed this sentence through the Courts of the Commonwealth of Pennsylvania and the United States

while he was imprisoned for a period of six years until he was cleared of all charges and released on a writ of habeas corpus by the United States District Court on August 28, 2001. (6a). Thereafter, the petitioner filed a civil action against the respondents for legal malpractice. Following the close of the pleadings, respondents filed a Motion for Judgment on the Pleadings alleging in part, that the statute of limitations has expired and that the petitioner should be precluded from proceeding with his case. The lower court granted Judgment on the Pleadings finding that the statute of limitations had expired on petitioner's claims. (11a-12a).

From the order and judgment entered by the Court of Common Pleas, petitioner filed an appeal to the Superior Court of Pennsylvania. On December 23, 2003, the Superior Court, relying upon the Decision and Order of the Supreme Court of Pennsylvania in Bailey v. Tucker, 533 Pa. 237, 621 A.2d 108 (1993), affirmed the Judgment and Opinion of the lower court. Petitioner then filed a Petition for Allowance of Appeal to the Supreme Court of Pennsylvania. In an Order dated May 25, 2004, the Supreme Court of Pennsylvania denied the Petition for Allowance of Appeal. Since the opinions and orders of the Pennsylvania courts violate the guaranties of due process and equal protection set forth in the

United States Constitution and conflict with other state courts of last resort, Petitioner has filed this Petition for writ of Certiorari.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE PENNSYLVANIA SUPREME COURT IN BAILEY V. TUCKER, 533 Pa. 237, 621 A.2d 108 (1993) VIOLATES THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE UNITED STATES AND PENNSYLVANIA CONSTITUTIONS AND CONFLICTS WITH OTHER STATE COURTS OF LAST RESORT BY REQUIRING A PARTY TO FILE A LEGAL MALPRACTICE ACTION ARISING OUT OF AN ATTORNEY'S REPRESENTATION OF THE PLAINTIFF IN A CRIMINAL MATTER WITHIN TWO YEARS AFTER THE ATTORNEY CLIENT RELATIONSHIP TERMINATES RATHER THEN WITHIN TWO YEARS OF THE DATE THE CAUSE OF ACTION ACTUALLY ACCRUES IN ACCORDANCE WITH THE REQUIREMENTS IMPOSED BY THE COURT FOR SUCH CLAIMS, THEREBY DENYING A VICTIM OF LEGAL MALPRACTICE THE DUE PROCESS OF LAW THAT IS ACCORDED OTHER PLAINTIFFS.

A. Standard of proof

In order to sustain a cause of action arising out of the misconduct of a lawyer who represented the plaintiff in a criminal matter, the Supreme Court of Pennsylvania sets forth

the following elements:

> a plaintiff seeking to bring a trespass action against a criminal defense attorney, resulting from his or her representation of the plaintiff in criminal proceedings, must establish the following elements:
>
> (1) The employment of the attorney;
>
> (2) Reckless or wanton disregard of the defendant's interest on the part of the attorney;
>
> (3) the attorney's culpable conduct was the proximate cause of an injury suffered by the defendant/plaintiff, i.e., "but for" the attorney's conduct, the defendant/plaintiff would have obtained an acquittal or a complete dismissal of the charges;
>
> (4) As a result of the injury, the criminal defendant/plaintiff suffered damages;
>
> (5) Moreover, a plaintiff will not prevail in an action in criminal malpractice unless and until he has pursued post-trial remedies and obtained relief which was dependent upon attorney error; additionally, although such finding may be introduced into evidence in the subsequent action it shall not be dispositive of the establishment of culpable conduct in the malpractice action.

Bailey v. Tucker, 621 A.2d at 115.

The statute of limitations, in accordance with this decision, begins to run not when the cause of action accrues, but rather two years from the date the attorney-client relationship terminates. Bailey v. Tucker, 621 A.2d at 116. The purpose of this rule was allegedly to prevent stale claims. In the pleadings in this case, petitioner set forth all the elements to establish a cause of action required by the Bailey decision. Petitioner appealed the unlawful sentence through the Courts of the Commonwealth of Pennsylvania and the United States until he was free of all charges. It was at the moment that he was freed by the District Court that the cause of action accrued against respondents. Until the determination by the Court, no right of action existed and the cause of action for legal malpractice had not accrued. By prematurely requiring the filing a lawsuit before the cause of action accrues, the accused exposes himself to civil liability in the event that the conviction is upheld. It also creates both legal and ethical complications for the lawyer who files the civil action not being able to show that a cause of action exists at the time that the case is filed. See 42 Pa.C.S.A. § 8355; Pa. R.C.P. 1023.1.

In their Motion for Judgment on the Pleadings filed with the trial court, the respondents alleged that the

petitioner's right to bring a law suit against his former attorneys was extinguished because he did not file an action within two years of terminating the attorney-client relationship. The lower court relied upon the Bailey decision in granting the Judgment on the Pleadings. The Superior Court, in affirming the lower court, noted that,

> Although, as did the trial court, we recognize the strength of M.A.'s argument that his malpractice claim did not arise until he was granted *habeas corpus* relief, we are likewise bound to follow the decisions of our Supreme Court.

M.A. v. Brabender, Pa. Super. , 839 A.2d 1133, 1135-1136 (2003).

The Court in Bailey failed to recognize that its interpretation of the two year statute of limitations as it relates to legal malpractice causes unfair and discriminatory treatment of a class of citizens. See 42 Pa.C.S.A. § 5524. In all other tort actions governed by Section 5524, the cause of action must first accrue before the limitation period begins to run. It is only in lawsuits against legal professionals in Pennsylvania that the action must be commenced long before a cause of action may ever accrue.

B. No Rational Basis

The equal protection clauses of the United States and

Pennsylvania Constitutions protect an individual from state action which causes discriminatory treatment by subjecting him or her to provisions in law not imposed on others of the same class. See Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and Pa. Const., Art. 1, §§11, 26; Correll v. Com., Dept. of Transp., Bureau of Driver Licensing, Pa. Cmwlth.,726 A.2d 427 (1999), affirmed, 564 Pa. 470, 769 A.2d 442 (1999).

The accrual of the cause of action for legal malpractice in this case is identical to the accrual of causes of action not only for common law malicious prosecution actions, but also federal § 1983 claims. In each instance, the cause of action does not arise and, unlike legal malpractice actions in Pennsylvania, the statute of limitations does not begin to run, until there is a finding that the wrongful conduct was legally unjustified. See Heck v. Humphrey, 512 U.S. 477 (1994); Sicola v. First National Bank of Altoona, 404 Pa. 18, 170 A.2d 584 (1961). There remains no rational basis for the determination by the Pennsylvania Supreme Court that legal professionals practicing in the criminal courts be given immunity for wrongful conduct which is not granted to any other entity in the Commonwealth of Pennsylvania.

C. Conflict with Other State Courts

With respect to legal malpractice actions of the type involved in this case, a majority of jurisdictions have held that appellate or post-conviction relief is a prerequisite to maintaining the cause of action. See Steele v. Kehoe, 747 So. 2d 931 (Fla. 1999); Streeter v. Young, 583 So.2d 1339 (Ala. 1991); Shaw v. State Dep't of Admin., 816 P.2d 1358 (Alaska 1991); Glenn v. Aiken, 569 N.E.2d 783 (Mass. 1991); Morgano v. Smith, 879 P.2d 735 (Nev. 1994); Carmel v. Lunney, 511 N.E.2d 1126 (N.Y. 1987); Stevens v. Bispham, 851 P.2d 556 (Or. 1993); Peeler v. Hughes & Luce, 868 S.W.2d 823 (Tex. Ct. App. 1993), aff'd, 909 S.W.2d 494 (Tex. 1995). With regard to the statute of limitations, however, other states have determined that a plaintiff's obligation to file a lawsuit does not begin until post-conviction or appellate relief is granted. Once relief is granted and the plaintiff is cleared of charges, the statute of limitations for legal malpractice begins to run. See Clark v. Robison, 113 Nev. 949, 944 P.2d 788 (1997); Shaw v. State Dept. of Admin., PDA, 816 P.2d at 1362; Stevens v. Bispham, 851 P.2d at 561, 566. Pennsylvania appears to be the only state which requires that that the lawsuit be filed before the cause of action accrues.

The decision of the Supreme Court of Pennsylvania in Bailey creates an insurmountable burden which unfairly thwarts and denies an injured party his or her right to obtain relief in Pennsylvania courts. It serves to deny equal access to the courts by a defined class in clear violation of both the United States and Pennsylvania Constitutions. Moreover, there is no rational basis for the time limitation imposed by the Pennsylvania courts given the other protections given to lawyers limiting the right of action. The decision in Bailey should be overturned, the orders of the Pennsylvania Supreme and Superior courts should be reversed and this case should be remanded to the lower court to proceed to trial on its merits.

CONCLUSION

For the above stated reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Co- Counsel for Petitioner

August 23, 2004

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

MAJEED ALTAMIMI,	: No. 54 WAL 2004
	:
Petitioner	: Petition for Allowance
	: of Appeal from the
	: Order of the Superior
	: Court
	:
v.	:
	:
DANIEL J. BRABENDER, JR., AN	:
INDIVIDUAL AND W. RICHARD	:
COWELL, JOHN R WINGERTER,	:
LEE C. FULLER, TED J. PADDEN,	:
DONALD J. ROGALA, BRADLEY K.	:
ENTERLINE, MARY PAYTON	:
JARVIE, INDIVIDUALS AND	:
PARTNERS AND CARNEY	:
& GOOD, A PROFESSIONAL	:
PARTNERSHIP,	:
	:
Respondents.	:

ORDER

PER CURIAM

AND NOW, this 25th day of May 2004, the Petition for Allowance of Appeal is

DENIED.

2003 PA Super 505

M. A.,	:	IN THE SUPERIOR
	:	COURT OF
	:	PENNSYLVANIA
Appellant	:	
	:	
v.	:	
	:	
DANIEL J. BRABENDER, JR., AN INDIVIDUAL AND W. RICHARD COWELL, JOHN R WINGERTER, LEE C. FULLER, TED J. PADDEN, DONALD J. ROGALA, BRADLEY K. ENTERLINE, MARY PAYTON JARVIE, INDIVIDUALS AND PARTNERS AND CARNEY & GOOD, A PROFESSIONAL PARTNERSHIP,	:	
	:	
Appellants.	:	No. 87 WDA 2003

Appeal from the Order Entered December 17, 2002
In the Court of Common Pleas, Civil Division

BEFORE: LALLY-GREEN, TODD, and TAMILIA, JJ.

OPINION BY TODD, J.: FILED: DECEMBER 23, 2003

M.A. appeals from the order of the Erie County Court of Common Pleas granting Appellees' motion for judgment on the pleadings. We affirm.

The relevant facts of this case are as follows: M.A. is a citizen of Iraq who immigrated to the United States in 1994. He is a graduate of the University in Baghdad with a bachelor's

degree in mechanical engineering. Following graduation, M.A. entered the Iraqi army to serve his required term. While in the army he was selected to do some repair and rebuilding work on a nuclear reactor in Baghdad that had been destroyed by an enemy strike during Iraq's war with Iran. Because M.A. refused to take this assignment, he was taken into custody and placed in a special security building. From the time he was taken into custody until he was released over a year later, M.A. was tortured, abused, and held in a small, dark cell. M.A. suffered various forms of torture at the hands of the Iraqi guards, including hanging upside down, hanging by clasped hands behind his back, denial of food, and by repeated beatings. After approximately one year, M.A. again was approached to work at the reactor site. When he refused this second time, a torture device was placed into his penis, causing heavy bleeding and excruciating pain. On another occasion, he was forced to sit on an empty soda pop bottle, and later was beaten with the bottle after it was removed from his rectum. At least one of the guards also extinguished his cigarette on M.A.'s penis. Since he was tortured in Iraq, M.A. has been unable to have an erection, and suffers from incontinence. He is incontinent most often during the night and in cold weather, and typically wears a diaper on those occasions.

After immigrating to the United States, M.A. was charged in February 1995 with criminal solicitation to commit indecent assault, indecent assault, and corruption of a minor for an incident which, according to the Commonwealth, involved a ten year old boy sitting on M.A.'s lap while M.A. gyrated his

hips and rubbed his allegedly erect penis against the child's clothed buttocks. M.A. was wearing a diaper at the time the alleged incident occurred. He hired Appellee, Daniel J. Brabender, Jr. and his law firm to represent him.

According to M.A., he told Brabender, through his interpreter,[1] that he was innocent and did not commit any of the crimes charged. Brabender never asked M.A. about his background or for any information or facts, such as his impotence or incontinence, which may have helped M.A. prove his innocence. Instead, Brabender sought a plea agreement in return for probation on the charges. On Brabender's advice, M.A. entered into a plea agreement on February 13, 1995 in which he agreed to plead guilty to indecent assault and corruption of the morals of a minor in exchange for the Commonwealth's agreement to withdraw the solicitation charge. Pursuant to the plea agreement, on September 6, 1995, M.A. entered a plea of guilty to one count of indecent assault and one count of corruption of the morals of a minor. The solicitation

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[1] M.A. spoke very little English when he arrived in the United States, having only taken English as a course in high school. After arriving in Erie, he was taken to the International Institute of Erie, where he was given a counselor to help him adjust to his new country. This counselor served as his interpreter when he met with his attorney and in court.

charge was withdrawn. M.A. was then sentenced[2] on October 10, 1995 to an aggregate term of 1 to 5 years incarceration and placed in a sex offender program. Brabender's representation of M.A. terminated after he filed a motion to modify and reduce M.A.'s sentence, which was denied. M.A. ultimately served the maximum sentence of five years incarceration because he refused to complete the second part of the sex offender program, which required him to admit that he committed the acts to which he pled guilty.

While M.A. was in the process of appealing his conviction in our state courts, the Immigration and Naturalization Services ("INS") started deportation proceedings against him in light of his guilty plea and incarceration on charges involving moral turpitude. An INS hearing was held on October 21, 1997 and M.A. was ordered to be deported. On February 17, 1998, M.A. filed a petition for a writ of *habeas corpus* in the United States District Court for the Western District of Pennsylvania seeking relief from INS detention. Although a magistrate judge initially recommended that his petition be denied, it was subsequently recommended that the petition be granted on the basis that Brabender had provided ineffective assistance of counsel to M.A., which rendered his

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[2]The trial court did not provide a translator for M.A. at the plea hearing or require that the proceedings be translated verbatim, which they were not. Although M.A.'s counselor was present, it is not clear that he himself fully understood what was transpiring.

guilty plea invalid. By order dated August 28, 2001, the district court by the Honorable Sean J. McLaughlin granted M.A. 's *habeas corpus* petition and M.A. was released from INS detention.[3]

M.A. filed the instant lawsuit on February 15, 2002, claiming that Brabender and his law firm committed malpractice in their representation of him. On December 17, 2002, the Erie County Court of Common Pleas granted Brabender's motion for judgment on the pleadings on the basis that the applicable statute of limitations had expired. This timely appeal followed, in which M.A. now presents the following issue for our review:

> Whether, under Pennsylvania law and the due process clause of the United States and Pennsylvania constitutions, a plaintiff should be granted two years after his or her cause of action for legal malpractice in a criminal matter accrues within which to file a lawsuit against the attorney, instead of two years after the legal relationship between the client and the attorney terminates

(Appellant's Brief at 4.)

In its opinion of December 17, 2002, the trial court, by the Honorable William R. Cunningham, President Judge, stated as follows:

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[3]By this time, M.A. had served all of his state court sentence and was no longer in state custody.

> This Court is sympathetic to Plaintiff's argument that the statute of limitations should not begin to run until August 28, 2001 when Plaintiff's federal Writ of Habeas Corpus was granted. Plaintiff makes a powerful argument [that] all of the elements for a malpractice action do not exist until there is appellate exoneration. However, this argument was specifically considered and rejected by the Pennsylvania Supreme Court in ***Bailey v. Tucker,*** [533 Pa. 237, 621 A.2d 108 (1993)]. Hence this Court is dut[y]bound to follow the ***Bailey*** precedent.

(Trial Court Opinion, 12/20/02) Although, as did the trial court, we recognize the strength of M.A.'s argument that his malpractice claim did not arise until he was granted *habeas corpus* relief, we are likewise bound to follow the decisions of our Supreme Court. Under ***Bailey,*** as M.A.'s counsel essentially conceded at oral argument in this appeal, it is clear that, in criminal legal malpractice actions, the statute of limitations begins to run on the date of sentencing, or no later than the termination date of the attorney/client relationship.[4] In this case, it is undisputed that M.A. was sentenced on October 10, 1995 and that Brabender's representation ended later that month in 1995. M.A. instituted this lawsuit over five years after the statute

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[4]By contrast, in civil legal malpractice actions, the statute of limitations begins to run either at the time the harm is suffered or alternatively at the time the alleged malpractice is discovered. ***See Robbins & Seventko Orthopedic Surgeons Inc. v. Geigenberger,*** 674 A.2d 244 (Pa. Super. 1996).

of limitations began to run pursuant to ***Bailey***, well after the two-year limitations period allowed for negligence-based claims, and beyond the four-year limitations period applicable to contract claims. His claim was, however, filed within two years of the date on which M.A.'s federal habeas corpus petition was granted, August 28, 2001. Absent contrary direction from our Supreme Court, we are obligated to follow ***Bailey***, and M.A.'s malpractice claim is, therefore, untimely.

Order entering judgment **AFFIRMED.**

Judgment Entered:

/s/ Eleanor R. Valecko
Deputy Prothonotary

DATE: DECEMBER 23, 2003

MAJEED ALTAMIMI,	: IN THE COURT OF
Plaintiff	: COMMON PLEAS OF
	: ERIE COUNTY,
VS	: PENNSYLVANIA
	:
DANIEL J. BRABENDER, JR.	:
An individual and W.	:
RICHARD : COWELL, JOHN	:
R. WINGERTER LEE C.	:
FULLER, TED J. PADDEN	:
DONALD J. ROGALA,	:
BRADLEY K. ENTERLINE,	:
MARY PAYTON JARVIE,	:
individuals and partners and	:
CARNEY & GOOD, a	:
professional partnership,	:
Defendants	: NO. 10635 - 02

OPINION

The matter before the Court is the Defendants' Motion for Judgment on the Pleadings. For the following reasons, the Motion is granted.

FACTUAL HISTORY

This case was filed as a legal malpractice action following Plaintiff's criminal convictions for Indecent Assault and Corruption of a Minor. Plaintiff was originally charged with Criminal Solicitation, Indecent Assault and Corruption of the Morals of a Minor. Through Attorney Daniel Brabender, Jr., who represented Plaintiff, the Plaintiff signed a plea agreement February 13, 1995 whereby Plaintiff would be entering a plea of guilty to Indecent Assault and Corruption of the Morals of a

Minor and the Commonwealth would be withdrawing the charge of Criminal Solicitation.

Pursuant to the plea agreement, on September 6, 1995, Plaintiff entered a plea of guilty to one count of Indecent Assault and one count of Corruption of the Morals of a Minor. The solicitation charge was withdrawn. Plaintiff was sentenced on October 10, 1995 to an aggregate term of incarceration of one to five years. Attorney Brabender filed a timely Motion to Modify and Reduce Sentence which was denied. Attorney Brabender's representation of the Plaintiff then terminated.

After exhausting appeals in Pennsylvania, Plaintiff filed a Writ of Habeas Corpus in the United States District Court for the Western District of Pennsylvania. By Order dated August 28,2001, the Writ of Habeas Corpus was granted vacating Plaintiff's convictions. On February 15,2002 Plaintiff instituted the within lawsuit.

The pleadings are now closed. The Defendants' have filed a Motion for Judgment on the Pleadings claiming the statute of limitations has expired. In fact the statute has passed and this case must be dismissed.

The standard of review for the present Motion is well established:

> "A trial court must confine its consideration to the pleadings and relevant documents and accept as true all well-pleaded statements of fact, admissions and any documents properly attached to the pleadings presented to the party against whom the motion

> is filed. The Court may grant judgment on the pleadings only where the moving party's right to succeed is certain and the case is so free from doubt that the trial would clearly be a fruitless exercise." **Fokes v. Shoemaker**, 661 A.2d 877, at 878 (Pa. Super. 1995) quoting **McAllister v. Millville Company Mutual Insurance**, 640 A.2d 1283, 1285 (pa. Super. 1994).

In the case sub judice, there are no factual disputes regarding the relevant time periods and therefore it is clear the present action was not filed within the applicable statute of limitations.

DISCUSSION

Pennsylvania law requires that a legal malpractice action for negligence must be brought within two years of the date the cause of action begins. See 42 Pa. C.S.A. §5524. If the legal malpractice action is based on contract, it must be brought within four years of the date the cause of action arises. See 42 Pa. C.S.A. §5525. The threshold issue is when Plaintiffs cause of action arose. Generally, the statute of limitations begins to run in legal malpractice actions either at the time the harm is suffered or alternatively at the time the purported malpractice is discovered. See, **Robbins and Seventko Orthopedic Surgeons Inc. v. Geigenberger**, 674 A.2 244(1996). However, for a host of policy reasons, the Pennsylvania Supreme Court developed a more restrictive rule for criminal malpractice actions holding the statute of limitations commences at the date of sentencing or, no later than the termination date of the attorney/client relationship.

Bailey v. Tucker, 621 A2d 108, 116 (Pa. 1993).

In the case at bar, it is uncontroverted the Plaintiff's date of sentencing was October 10, 1995. While Attorney Brabender subsequently filed a Motion to Modify Sentence, Plaintiff concedes Attorney Brabender's representation ended then such that the attorney/client relationship was terminated by the end of October 1995. See Plaintiff's Reply to Defendant's New Matter, Paragraphs 58, 59. Hence there is no factual issue as to when the attorney/client relationship ended. Plaintiff further concedes, as he must, that the statute of limitations was not tolled until the filing of this present action on February 15, 2002. Thus Plaintiff's lawsuit was not instituted until five years and nearly four months after the statute of limitations began. As such, more than two years have lapsed for purposes of filing a legal malpractice action based on negligence and more than four years have lapsed based on a legal malpractice action under a theory of contract. Hence this case must be dismissed.

This Court is sympathetic to Plaintiff's argument that the statute of limitations should not begin to run until August 28, 2001 when Plaintiffs federal Writ of Habeas Corpus was granted. Plaintiff makes a powerful argument all of the elements for a malpractice action do not exist until there is appellate exoneration. However, this argument was specifically considered and rejected by the Pennsylvania Supreme Court in **Bailey v. Tucker,** supra. Hence, this Court is dutibound to follow the **Bailey** precedent.

MAJEED ALTAMIMI,	: IN THE COURT OF
Plaintiff	: COMMON PLEAS OF
	: ERIE COUNTY,
VS	: PENNSYLVANIA
	:
DANIEL J. BRABENDER, JR.	:
An individual and W.	:
RICHARD : COWELL, JOHN	:
R. WINGERTER LEE C.	:
FULLER, TED J. PADDEN	:
DONALD J. ROGALA,	:
BRADLEY K. ENTERLINE,	:
MARY PAYTON JARVIE,	:
individuals and partners and	:
CARNEY & GOOD, a	:
professional partnership,	:
Defendants	: NO. 10635 - 02

ORDER

AND NOW, to-wit, this 17 day of December 2002, for the reasons set forth in the accompanying Opinion, the Motion for Judgment on the Pleadings as filed by the above captioned Defendants is hereby GRANTED and this case is dismissed.

BY THE COURT

S/WILLIAM R. CUNNINGAHAM,
President Judge

(2)

No. 04-265

Supreme Court, U.S.
FILED
SEP 22 2004
OFFICE OF THE CLERK

In The
Supreme Court of the United States

MAJEED ALTAMIMI,

Petitioner,

v.

DANIEL J. BRABENDER, JR., W. RICHARD COWELL, JOHN R. WINGERTER, LEE C. FULLER, TED J. PADDEN, DONALD J. ROGALA, BRADLEY K. ENTERLINE, MARY PAYTON JARVIE, individuals, and CARNEY & GOOD, a professional partnership,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Pennsylvania

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESTATEMENT OF THE QUESTION PRESENTED FOR REVIEW

1. Whether the state court properly dismissed a state law legal malpractice action as time barred where the Petitioner had filed his action more than six years after the termination of the attorney-client relationship and more than six years after his sentencing?

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTER STATEMENT OF THE CASE

This is a state law claim for a legal malpractice under Pennsylvania law arising out of Petitioner's guilty plea to Indecent Sexual Assault and Corruption of a Minor. Petitioner, an immigrant from Iraq, was charged with Criminal Solicitation (18 Pa.C.S.A. §902), Indecent Sexual Assault (18 Pa.C.S.A. §3126) and Corruption of the Morals of a Minor (18 Pa.C.S.A. §6301) arising out of an incident occurring on January 19, 1995. Defendant Daniel Brabender, Jr., Esquire represented Petitioner in defense of the criminal charges filed against him. Defendant disputes that Petitioner asserted his innocence. Petitioner signed the plea agreement in connection with the matter on or about February 13, 1995 and testified regarding the plea on September 6, 1995. (Transcript of plea hearing, RR, p. 131a). The Petitioner testified at that hearing that he understood the plea agreement (RR, p. 137-138a), that he understood he was pleading guilty with no agreement as to sentencing (RR, p. 142a) and that he acknowledged he had spoken to his attorney and his interpreter about what was in the agreement (RR, p. 141a). As a result of the agreement, the charge of Criminal Solicitation was dropped and Petitioner pled guilty to the offenses of Indecent Sexual Assault and Corruption of the Morals of a Minor. Thereafter, Petitioner was sentenced to incarceration at a sentencing hearing on or about October 10, 1995. Defendant Brabender filed a Motion to Modify and Reduce Sentence on behalf of Petitioner which the court denied the very next day. After that ruling, but sometime before the end of October 1995, Petitioner terminated Mr. Brabender as his counsel.

After terminating Mr. Brabender as his counsel in October 1995, Petitioner did not file a direct appeal in the matter. However, Petitioner subsequently retained James Stuczynski, Esquire, in June of 1996. On June 3, Petitioner filed a Motion for Post Conviction Collateral Relief (PCRA) which was denied on November 25, 1996. Petitioner appealed and said appeal was denied on September 8, 1997. A Petition for Allowance of Appeal was filed to the Pennsylvania Supreme Court, which was denied on February 23, 1998.

As a consequence of Petitioner's guilty plea and incarceration on charges involving "moral turpitude," the Immigration and Naturalization Services (INS) served upon him an Order to Show Cause why he should not be deported. An INS hearing was held on October 21, 1997, and Petitioner was ordered to be deported. That decision was affirmed on February 5, 1999. Subsequently, in order to avoid the deportation, Petitioner filed a Petition for Habeas Corpus in the United States District Court for the Western District of Pennsylvania. It was in INS proceedings that the Petitioner for the first time raised his issues regarding the incontinence, impotence and loss of sexual functioning to attempt to show innocence. However, the sexual function was not an element of the underlying criminal charges. The magistrate judge originally recommended denying the Petition; however, after Petitioner filed objections to the Magistrate's Report, his Petition was granted. The Commonwealth of Pennsylvania did not oppose the Petition for Habeas Corpus as Petitioner had served all of his state court sentence and was no longer in the custody of the Commonwealth at the time his Petition was finally granted on August 21, 2001. Petitioner asserts that he was cleared of all the charges, when in fact, he was

not. To the contrary, the habeas corpus was granted allowing him to stay in the country.

Petitioner, on February 15, 2002, then filed this legal malpractice claim against Defendants, Mr. Brabender and the Law Offices of Carney & Good, more than six (6) years following his sentencing in state court on October 10, 1995 and Mr. Brabender's termination as Petitioner's counsel in October 1995.

REASONS FOR DENYING THE WRIT

I. Petitioner has not stated a claim for violation of equal protection or of due process

This Court has long held that "[s]tatutes of limitation are vital to the welfare of society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose by giving security and stability to human affairs. An important public policy lies at their foundation. They stimulate to activity and punish negligence." *Wood v. Carpenter*, 101 U.S. 135, 139 (1879). This Court consistently upholds the States' interest in eliminating stale claims. As this Court explained:

> Statutes of limitation . . . are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.

Bowen v. City of New York, 476 U.S. 467, 482 n. 13 (1986); *American Pipe and Const. Co. v. Utah*, 414 U.S. 538, 554 (1974); *Order of Telegraphers v. Railway Exp. Agency*, 321 U.S. 342, 348-49 (1944). There is no absolute and unlimited constitutional right of access to courts, only reasonable access is necessary. *Ciccarelli v. Carey Canadian Mines, Ltd.*, 757 F.2d 548 (3d Cir. 1985). The statute of limitations in Pennsylvania, under 42 Pa.C.S.A. §5524, provides that negligence claims must be brought within two (2) years of the date the cause of action arises. The Pennsylvania Supreme Court in *Bailey v. Tucker*, 621 A.2d 108 (Pa. 1993) examined claims of legal malpractice and determined when the statute of limitations begins to run. As the statute of limitations does not treat similarly situated persons differently, is reasonably related to legitimate government interests, and the Petitioner was given reasonable opportunity to be heard, there is no federal constitutional violation here. The determination of when a state law cause of action arises is purely a matter of state law, and this Court should deny the Petition.

A. The statute of limitations here does not treat similarly situated persons differently

The Equal Protection Clause of the Fourteenth Amendment "is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985). Petitioner's claim here that the statute of limitations for a legal malpractice claim arising out of a criminal claim treats him differently than those arising out of other tort claims such as malicious prosecution or abuse of process. However, this is a misstatement of the law of Pennsylvania. The statute of limitations in this matter

treats the claimants identically and requires that the claim be brought within two years from the date the claim accrues. The law is clear in Pennsylvania that the statute of limitations in a legal malpractice action arising out of a criminal matter commences to run not later than the termination of the attorney-client relationship. *Bailey v. Tucker*, 621 A.2d 108 (Pa. 1993). In *Bailey*, *supra*, the court found that in the context of a criminal malpractice action, the time when the harm is suffered in the typical case is "easily identifiable, i.e., the date of sentencing." *Bailey*, 621 A.2d at 116. Nevertheless, the court recognized that in criminal proceedings the date the defendant is aware that counsel may have been responsible for the alleged harm is often harder to pinpoint. *Id.* Therefore, the court held that the appropriate starting point for the statute of limitations in a criminal malpractice suit is the termination of the attorney-client relationship since at that point the aggrieved defendant is aware of the injury and is on clear notice to investigate any alternative cause of that harm which he believes to exist. *Id.*

Although Petitioner argues that he must bring his claim prior to it accruing, this is simply not the case. In fact, Petitioner's cause of action accrues at the date of sentencing. At that point, duty, breach and harm have all occurred, according to the court in *Bailey*. The cause of action has accrued at that point. And moreover, the court in *Bailey* specifically addressed this element of the claim not as an element necessary for the prima facie case to file the suit, but rather that "a plaintiff **will not prevail in an action in criminal malpractice** unless and until he has pursued post-trial remedies and obtained relief which was dependent upon attorney error." Specifically addressing the Petitioner's issue, the court notes that "[t]his

requirement does not, however, relieve the plaintiff of his duty to initiate this cause of action within the statute of limitations period as hereinafter discussed." *Id.*, 621 A.2d at 115. While plaintiff may later be precluded from prevailing in a legal malpractice action because he cannot prove that he was innocent of the action and able to obtain post-sentencing relief, this does not mean his claim has not accrued. Rather, these are elements that, if not proven, break the chain of causation.

The claim for legal malpractice arising out of a civil action is identical in this respect. *Robbins & Seventko Orthopedic Surgeons, Inc. v. Geisenberger*, 674 A.2d 244 (Pa.Super. 1996). There, the plaintiff may later obtain relief in the appellate court which would prevent his recovery in the legal malpractice action because it breaks the chain of causation. However, as explained by the court in *Robbins*, this does not mean that the cause of action did not accrue. The court in *Robbins* explained the *Bailey* holding as follows:

> While the Court did require a plaintiff to pursue post-trial remedies and obtain the relief that was dependent on the attorney's errors before the malpractice claim was cognizable, it did not exempt the plaintiff from filing the action within the prescribed statute of limitations period. *Bailey*, 533 Pa. at 251 n. 13, 621 A.2d at 115 n. 13.

The Court explained:

> "[w]e recognize the concern about the amount of claims that might clog the civil dockets. However, we feel that it is more important that we require these criminal defendants to file their claims within the statutory period to prevent any injustice to an attorney who has to defend a claim of

> malpractice many years after his relationship with the client ends." *Bailey,* 533 Pa. at 252 n. 15, 621 A.2d at 115 n. 15. In those instances where the malpractice claim must be filed before the post conviction process was completed, the Court directed an attorney defendant to interpose a preliminary objection on the grounds of demurrer. The trial court was then instructed to reserve its ruling until the post conviction process was resolved. *Bailey*, 533 Pa. at 251 n. 13, 621 A.2d at 115 n. 13.

Robbins, 674 A.2d at 248. The court in *Robbins* then held that the statute of limitations in a legal malpractice action arising out of a civil matter was not tolled during the appeal process in that matter. Therefore, the rule in *Bailey* is in that manner no different for civil action claimants and the causes of action accrue when duty, breach and harm are present. Here, the Petitioner's cause of action accrued at the time he alleged that Mr. Brabender allowed him to enter into the plea agreement and when he was subsequently sentenced. All of this occurred in 1995. Therefore, his claim accrued in 1995. Further, there is no question that Petitioner was actually aware of the duty, breach and the actual harm at that point. He had been sentenced and he pleads in this matter that he had maintained his innocence throughout serving his sentence (although this fact is disputed). He was accordingly aware then at the time of his sentencing that he had pleaded guilty to a crime for which he was sentenced to jail and that he maintained he did not commit.

The instant matter is not a malicious prosecution action, nor is it a false arrest or imprisonment claim. Rather, this is a claim for legal malpractice arising out of a criminal matter, just as the claim in *Bailey*. The elements

of malicious prosecution and false imprisonment claims are very different than those of a legal malpractice action and the claimants are not similarly situated. In a legal malpractice action, a plaintiff is bringing a claim against his own lawyer, and the court in *Bailey* directly addressed the policy considerations involved in a criminal defendant suing his lawyer. The Court explained:

> Unlike in the civil litigation area, a client does not come before the criminal justice system under the care of his counsel alone; he comes with full panoply of rights, powers, and privileges. These rights and privileges not only protect the client from abuses of the system but are designed to protect the client from a deficient representative. Thus, whereas in a civil matter a case once lost is lost forever, in a criminal matter a defendant is entitled to a second chance (perhaps even a third or fourth chance) to insure that an injustice has not been committed. For these reasons we are constrained to recognize that criminal malpractice trespass actions are distinct from civil legal malpractice trespass actions, and as a result the elements to sustain such a cause of action must likewise differ.

Id. at 114. The Petitioner is claiming that his due process rights are being violated because he must file his legal malpractice action against his criminal attorney within two years from the date of the termination of the attorney-client relationship. His argument is that he has fewer rights than those bringing false imprisonment or malicious prosecution claims. However, in actuality, as the court addressed in *Bailey*, the criminal defendant comes with full panoply of rights, powers, and privileges as part of the criminal process designed to protect him from

deficient representation. Therefore, the statute of limitations began to run at Petitioner's sentencing on October 10, 1995. Pursuant to 42 Pa.C.S.A. §5524, a legal malpractice action in negligence must be brought within two (2) years of the date the cause of action arises. The instant action, brought by Petitioner more than six (6) years after the cause of action arose, is barred by the statute of limitations applicable in legal malpractice actions sounding in both negligence and contract.

As Petitioner cannot meet his burden that he was treated differently than similarly situated classes of persons. Petitioner was not denied due process, and this Petition should be denied.

B. The statute of limitations is rationally related to legitimate governmental interests

Even assuming Petitioner was treated differently, this statute of limitations is constitutional. In considering whether state legislation violates the Equal Protection Clause of the Fourteenth Amendment, U.S. Const., Amdt. 14, §1, the Court applies different levels of scrutiny to different types of classifications. Under the rational basis standard of review, "legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *Cleburne, supra*, 473 U.S. at 440; *See also U.S. Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973); *Romer v. Evans,* 517 U.S. 620, 632-33 (1996).

The court in *Ciccarelli, supra*, examined the appellant's claim that the difference in the running dates of the statutes of limitations in the wrongful death action and survival action violated equal protection and due process

rights. The court held that it did not and stated that even statutes that in effect extinguish claims before they accrue can be constitutional. *Id.* The court noted that "[b]ecause statutory periods are in some sense arbitrary, the period to initiate suit occasionally expires before a claimant has sustained any injury, *See e.g. Jewson v. Mayo Clinic*, 691 F.2d 405, 411 (8th Cir. 1982); *See also Dincher v. Marlin Firearms Co.*, 198 F.2d 821, 822-23 (2d Cir. 1952), or before the claimant knows he has sustained an injury, see, e.g., *Jewson*, 691 F.2d at 411; *Clark v. Gulesian*, 429 F.2d 405, 406 (1st Cir. 1970), cert. denied, 400 U.S. 993, 91 S.Ct. 461, 27 L.Ed.2d 441 (1971)." *Id.* 757 F.2d at 555. The court found that these statutes do not violate the constitution so long as the term is otherwise reasonable. *Id. See also Braswell v. Flintkote Mines, Ltd.*, 723 F.2d 527, 531 (7th Cir. 1983); *Mathis v. Eli Lilly & Co.*, 719 F.2d 134, 139 (6th Cir. 1983); *Jewson*, 691 F.2d at 411; *Ornstein v. Regan*, 604 F.2d 212, 214 (2d Cir. 1979).

The court in *Ciccarelli* also held that having different running times for different claims does not violate equal protection. The court stated:

> The distinction does not implicate a suspect class nor a fundamental right; consequently, if the distinction is rationally related to a legitimate government interest it does not violate equal protection. A distinction between wrongful death and survival actions, and those personal injury actions brought by living plaintiffs, is related to the state's interest – and those of the survivors – in the prompt settlement of the economic and legal affairs of the deceased. The state legislature may not be said to be irrational in encouraging a personal representative to bring suit promptly. Requiring all wrongful death and survival actions

> to be commenced within one and two years, respectively, of the decedent's death may well represent a conclusion by the state that the right to be free of state claims in time comes to prevail over the right to prosecute them even though this may lead to harsh results in some cases.

Id., 757 F.3d at 555-56.

Likewise, in the instant matter, Petitioner claims that the statute of limitations accrual established in *Bailey* violates the constitution because it treats claims against lawyers differently than it treats claims for malicious prosecution or false imprisonment. However, this implicates neither a suspect class nor a fundamental right. Therefore, so long as the distinction is rationally related to a legitimate government interest, it is constitutional. In *Bailey*, the Pennsylvania Supreme Court addressed the numerous government interests involved in litigation in claims against lawyers, and in particular, lawyers in criminal malpractice actions. Those interests included:

1) the threat of a malpractice action for representation of a criminal defendant will have a "chilling effect" on counsel's ability to defend his client fearlessly and independently;

2) as a consequence the system will have difficulty attracting and maintaining attorneys to represent persons charged with crime, and the retention of an attorney will become prohibitively expensive;

3) aggrieved defendants already have sufficient systemic remedies for attorney ineffectiveness such as appeals and post-conviction proceedings;

4) to permit such a cause of action will result in a flood of litigation; and

5) the existence of such a cause of action leads to the possibility of a guilty "in fact" party actually profiting from his crime where the attorney's negligence was directed to a non-factual aspect of the criminal defense

Id., 621 A.2d at 112-13. The Pennsylvania Supreme Court appropriately balanced a plaintiff's right to bring a claim with a defendant's right to be put on notice of a claim and the interest of avoiding litigation of stale claims. Pennsylvania has a Writ procedure which allows the plaintiff to file a notice of a claim without asserting the facts supporting the elements of a cause of action. In these types of circumstances, this would place the defendant lawyer on notice to maintain files and information with respect to a representation. The Pennsylvania Supreme Court clearly considered these issues in holding that the cause of action accrued at the latest at the time of the termination of representation. Therefore, the Pennsylvania courts had rational reasons related to legitimate government interests in deciding the accrual period for claims against lawyers. Accordingly, the statute of limitations accrual period for legal malpractice claims is constitutional. Petitioner has not met his burden of establishing that there is no rational reason related to legitimate government interests in this matter. Accordingly, the lower courts appropriately ruled and there is no compelling reason justifying additional review. Accordingly, this Petition should be denied.

II. Petitioner has failed to plead any proper jurisdictional basis for this Court to hear these state law claims

Petitioner's attempt to have this Court consider whether or not the statute of limitations for legal malpractice claims violates Equal Protection and the *Constitution of the Commonwealth of Pennsylvania* must fail as there is no proper jurisdictional basis. The United States Supreme Court may review judgments rendered by state courts under 28 U.S.C. §1257. The section permits review by certiorari of a final judgment of the highest court of a state that is premised on federal law or where the validity of a state statute is violative of federal law or the Constitution. The decisions by the Pennsylvania appellate courts at issue in this Petition for Writ of Certiorari were based exclusively on state law claims. There is no reference in the decisions of the Pennsylvania appellate courts to any federal law, including the federal equal protection and due process clauses. More importantly, 28 U.S.C. §1257 only permits this Court to review decisions of the highest court of a state which concern federal law. Further, Petitioner is not complaining that the terms of the state law statute of limitations violate federal law. Rather, the Petitioner appears to be complaining that the Pennsylvania Supreme Court's holding of the elements for a state law claim of legal malpractice violates due process. This is entirely a state law issue and does not implicate federal law in any way and 28 U.S.C. §1257 does not confer jurisdiction on this Court to hear this claim.

Finally, by definition, Petitioner's claim that the application of the statute of limitations denies him rights under the Constitution of the Commonwealth of Pennsylvania is a state law claim, and 28 U.S.C. §1257 will not

confer jurisdiction upon this Court to entertain such a claim. Therefore, this Petition should be denied.

CONCLUSION

Because the state courts have properly ruled regarding this state law issue, and no federal constitutional violation occurred, this Court should deny the Petition.

Respectfully submitted,

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